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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER;
AND RONALD K. DESOUZA, VICE PRESIDENT OF
STUDENT AFFAIRS, COPPIN STATE COLLEGE,
PETITIONERS,

v.

JAMES R. GRATTAN and ADRIENNE S. HEDMAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LEAGUE OF KANSAS MUNICIPALITIES IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Since the Court's decision in Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), Kansas municipalities have increasingly found themselves defendants in lawsuits brought under 42 U.S.C. §1983.

One of the questions of law that commonly arises in such cases involves the selection of the applicable state statute of limitations to apply to the §1983 cause of action. This occurs in §1983 cases due to the absence of a federal limitations period for such actions and the command of 42 U.S.C. §1988 to apply the law of the states in such instances "so far as the same is not inconsistent with the Constitution and laws of the United States."

The League of Kansas Municipalities is a statutorily recognized instrumentality of its over 500 member cities. K.S.A. 12-1610e. It files this brief amicus curiae in support of the position of the State of Maryland in the case at bar that the civil rights claims of the plaintiffs were time barred by Maryland state law. Further, due to the increasing frequency with which Kansas cities are defending

§1983 actions since Monell, supra, amicus wishes to respectfully offer a suggested methodology for the Court's consideration for analyzing statute of limitations questions in future federal civil rights cases.

The statute of limitations question has arisen in three §1983 cases involving Kansas cities that were recently consolidated with a number of other cases for review and hearing en banc by the United States Circuit Court of Appeals for the Tenth Circuit. Condrey v. City of Eastborough, Kansas, No. 80-1513; Pike v. City of Mission, Kansas, Nos. 82-1245 and 82-1344; and Hamilton v. City of Overland Park, Kansas, No. 83-1593. The Tenth Circuit consolidated these cases for the specific purpose of developing a consistent methodology for analyzing §1983 statute of limitations questions. The

federal district court judges for the District of Kansas are currently divided on this question as well.

The Kansas Supreme Court and Court of Appeals have rendered opinions on the statute of limitations question on a number of occasions in recent years. Cooper v. Hutchinson Police Department, 6 Kan. App. 2d 806, 636 P.2d 184 (1981); Miller v. City of Overland Park, 231 Kan. 557, 646 P.2d 1114 (1982); and, most recently, Dutoit v. Board of County Commissioners of Johnson County, Kansas, 233 Kan. 995, 667 P.2d 879 (1983) (hereinafter referred to as Dutoit).

The League of Kansas Municipalities participated as amicus curiae in the Dutoit case in which the Kansas Supreme Court rejected the application of a specific state thirty-day period of limitation to a §1983 claim challenging the con-

stitutionality of special assessments. The Court opted instead for a two-year general statute of limitations (K.S.A. 60-513(a)) because "[a] thirty-day limitation period is not sufficiently generous to preserve the remedial spirit of 42 U.S.C. §1983 (Supp. V. 1983)." Id. at 1006. This holding, with which amicus strongly disagreed, was rendered despite decades of Kansas case law indicating that actions challenging special assessments brought under state law alleged the same federal constitutional cause of action as a cause of action asserted under §1983.

During the 1984 Kansas legislative session, amicus will be requesting enactment of a specific state statute of limitations for §1983 actions challenging special assessments. Absent some clearer direction from the Court on how §1983

statute of limitations questions can be resolved, it will be most difficult to advise the Kansas legislative on what might be viewed as an acceptable limitation period.

The Court recently referred to the evolving definition and uncertain contours of municipal liability under §1983. Newport v. Facts Concerts, Inc., 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Surely one of the greatest areas of uncertainty in §1983 litigation involving municipalities is the applicable state statute of limitations question. While amicus wholeheartedly agrees that §1988 by its very terms precludes nationwide uniformity in §1983 limitation periods, Board of Regents v. Tomanio, 446 U.S. 478, 489, 100 S.Ct. 1790, 64 L.Ed.2d 440, (1980) (hereinafter referred to as Tomanio), it is patently

clear that the lower courts need additional guidance and direction in deciding such questions.

SUMMARY OF ARGUMENT

Jurists, legal scholars, and civil rights litigants alike generally agree that there is disarray in the approaches employed by many lower courts in choosing state limitation periods to apply to §1983 and other federal civil rights actions. The case at bar presents a timely opportunity for the Court to provide needed additional guidance in analyzing and deciding such questions.

Decisions by the Court extending back over 100 years provide a useful and workable model for analyzing §1983 statute of limitations questions. In the absence of a statute of limitations specifically for federal civil rights

claims, these cases require courts to identify the state common law or statutory cause of action that is most analogous to the cause of action asserted under §1983. The statute of limitations governing the most analogous state cause of action should then be applied unless it is found to be inconsistent with the Constitution and laws of the United States.

A state statute of limitations should be treated as inconsistent if it either (1) discriminates against the federal cause of action, or (2) after consideration of all the relevant circumstances, the limitation period fails to afford a reasonable period in which to assert the plaintiff's §1983 cause of action. Circumstances relevant to the latter inquiry include the policies underlying §1983 and the state limitation period and the plaintiff's actual

assertion of the federally protected right within the applicable state limitation period.

Utilization of this methodology to analyze the state limitation period applied by the trial court to the plaintiffs' civil rights actions in the case at bar indicates that the Fourth Circuit erred when it reversed the trial court's decision on the statute of limitations question. Application of the six-month limitation period in Md. Ann. Code Article 49B, §9(a), does not discriminate against the federal cause of action. On the contrary, it puts the federal cause of action on equal footing with its state law analogue.

The timely filing of the plaintiffs' Title VII claims within the federal six-month limitation period initially demonstrates the reasonableness of the period

selected by the trial court. The state policies of repose underlying the state limitation period of promoting the prompt assertion and resolution of employment discrimination claims further supports the conclusion that the six-month limitation period was reasonable under the circumstances. Therefore, application of the six-month statutory limitation period was indeed consistent with the Constitution and laws of the United States.

ARGUMENT

I. THERE IS WIDESPREAD CONFUSION AMONG THE LOWER COURTS CONCERNING THE METHODOLOGY FOR ANALYZING AND DECIDING §1983 STATUTE OF LIMITATIONS QUESTIONS.

In a number of its recent federal civil rights cases the Court has consistently concluded that 42 U.S.C.

§§1981 and 1983[1] contain neither specific statutes of limitations nor rules relating to tolling, and 42 U.S.C. §1988 requires that such rules of decision be borrowed from state law unless a rule is "inconsistent with the Constitution and laws of the United States." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (hereinafter referred to as Johnson); Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) (hereinafter referred to as Robertson); Tomanio, supra; and Chardon v. Fumero Soto, _____ U.S. _____, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983) (hereinafter referred

[1]For purposes of brevity, reference will usually be made throughout this brief to only §1983 statute of limitations questions, although the same principles usually apply to §1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

to as Chardon). While the Court has clearly directed that such an approach should be followed, additional guidance for deciding such sensitive questions is in order.

Lower courts have been instructed variously to borrow "the state law of limitations governing an analogous cause of action," Tomanio, 446 U.S. at 483-484, 64 L.Ed.2d at 447, to "adopt the local law of limitation, Runyon v. McCrary, 427 U.S. 160, 180, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), and that "the controlling period would ordinarily be the most appropriate one provided by state law." Johnson, 421 U.S. at 462, 95 S.Ct. at 1721. Despite these and other emphatic statements of the Court's general policy regarding the use of and deference to be accorded to state law in judging the timeliness of federal civil rights actions, the absence

of a systematic method for deciding such questions has led to conflicts between and within the United States Circuit Courts of Appeals, resulting in considerable uncertainty for civil rights litigants.

The now legendary §1983 statute of limitations conflicts between the circuits are well-chronicled in various annotations and law review articles.[2] The essence of the §1983 statute of limitations dilemma facing federal and state courts has been accurately summarized by one commentator:

> The general rule that state statutes of limitations are ap-

[2]See Annot., 45 A.L.R. Fed. 548 (1979); Special Project, Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations, 65 Cornell L. Rev. 1011, 1072 (1980); and Comment, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. St. L.J. 97 (1976).

> plicable to federal civil rights actions brought under 42 U.S.C. §1983 is a rule more easily stated than applied, and the choice of which statute of limitations of a particular state shall apply has been a difficult issue for the courts. Some courts, seeking to provide certainty to civil rights litigants in a particular state, have chosen one state statute of limitations in a state to govern all §1983 suits, while other courts have chosen instead different statutes of limitations of the same state in different §1983 cases, depending on the facts of the case.[3]

The uncertainty facing §1983 litigants concerning the applicable state statute of limitations is perhaps even more troubling when a consensus within any one circuit on the method for deciding such questions cannot be reached. This very problem exists at this time in the United States Court of Appeals for the

[3]Annot., supra, note 2, 45 A.L.R. Fed. at 553.

Tenth Circuit, and is evidenced by the sharply divided majority and dissenting opinions in Garcia v. University of Kansas, 702 F.2d 849 (10th Cir. 1983).

Due to this problem the Tenth Circuit recently consolidated a number of cases, including three cases involving Kansas cities (see Statement of Interest, p.3), and has held a hearing en banc for the purpose of developing a circuit-wide methodology for deciding §1983 statute of limitations questions. In her dissenting opinion in Garcia v. University of Kansas, Circuit Judge Seymour articulated the challenge facing the lower courts in undertaking such a task when she observed:

> Unfortunately, the Supreme Court has provided little guidance to the lower courts on how to choose a statute from among several state statutes of limitation, each of which governs a cause of action arguably anal-

> ogous to the section 1981 or section 1983 action at hand. . . Not surprisingly, this lack of guidance has resulted in diverse approaches among the circuits to the task of selecting a state limitation statute governing actions analogous to claims under section 1981 or section 1983. (Citations omitted.) Id. at 851.

Amicus respectfully submits that the case at bar presents an appropriate and timely opportunity for the Court to provide a clear methodological framework for the resolution of federal civil rights statute of limitations questions. Furthermore, the framework can be derived directly from the Court's prior decisions.

II. THE PRIOR DECISIONS OF THIS COURT PROVIDE A METHODOLOGY FOR CHOOSING STATE LIMITATION PERIODS IN FEDERAL CIVIL RIGHTS CASES.

As the Court indicated in Johnson, 421 U.S. at 462, 95 S.Ct. at 1721, the

"borrowing" of state statutes of limitations is necessary in order to determine the timeliness of federal civil rights actions as well as causes of action asserted pursuant to a number of other federal laws.[4] Consequently, in addition to its recent federal civil rights opinions, the Court has a rich heritage of decisions on such questions from which to draw.

A court is faced with two problems in choosing a state statute of limitations to apply to a §1983 cause of action. First, the court needs to characterize the §1983 cause of action and identify an

[4]See Auto Workers v. Hoosier Corp., 383 U.S. 696, 701-704, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966) (Labor Management Relations Act); Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947) (National Bank Act); Chattanooga Foundry v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906) (Sherman Act); and Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895) (hereinafter referred to as Campbell) (Patent Act).

analogous cause of action along with its applicable limitation period. Tomanio, 446 U.S. at 483-484, 64 L.Ed.2d at 447. The second, and perhaps more perplexing, problem is to determine whether application of that limitation period would be "inconsistent" with the Constitution and laws of the United States.

A. Choosing The Analogous State Cause Of Action And Applicable Limitation Period.

"Borrowing" a state statute of limitation and related rules of repose for judging the timeliness of a §1983 action requires initially that a court characterize the plaintiff's §1983 cause of action. It is generally agreed that §1983 does not confer substantive rights, but rather is remedial in nature. Maine v. Thiboutot, 448, U.S. 1,4, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); Monell v. Depart-

ment of Social Services, 436 U.S. at 700-701, 56 L.Ed.2d at 641; and Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The §1983 remedy "broadly encompasses violations of federal statutory as well as constitutional law." Maine v. Thiboutot, 448 U.S. at 4, 65 L.Ed.2d at 559.

Section 1983 has been described as creating a "species of tort liability," Smith v. Wade, _____ U.S. _____, 103 S.Ct. 1625, 75 L.Ed.2d 632, 637 (1983). The common law of torts has provided the basis for the Court's decisions concerning damages and immunities available under §1983. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); and Newport v. Fact Concerts, 453 U.S. at 258-259, 69 L.Ed.2d at 626-627.

Nonetheless, the Court has never adopted the tort characterization in even

a general way as the preferred or required approach to analyzing §1983 statute of limitations questions. On the contrary, it has left the lower courts free to "borrow" limitation periods based on analogous state causes of action. Tomanio, 446 U.S. at 483-484, 64 L.Ed.2d at 447. The wisdom of not requiring courts to analogize to state "tort" causes of action in all cases is evident from the very nature of the rights protected by §1983, including federal statutory as well as constitutional rights. At times there will be simply no common law tort cause of action analogous to a right secured by a federal statute or the Constitution.[5]

When the common law of torts does provide the most appropriate analogue,

[5]Comment, supra, note 2, 1976 Ariz. St.L.J. at 117-121, contains a thorough critique of simplistic tort analogies in civil rights cases.

the next question often is whether a general tort or a specific tort is the most analogous state cause of action. Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983); and Miller v. City of Overland Park, supra. Questions also may arise concerning the scope of a specific common law tort. Runyon v. McCrary, 427 U.S. at 182, 96 S.Ct. at 2600.

In still other instances, such as in the case at bar, a state legislature will have created specific state statutory causes of action that are most analogous to the §1983 cause of action. The "borrowing" of the limitation period for statutory causes of action is directly supported by the text of §1988 which refers to reliance on "the common law, as modified and changed by the constitution and statutes of the state. . . so far as the same is not inconsistent with the Con-

stitution and laws of the United States." This statutory approach has been recognized by the U.S. Circuit Court of Appeals for the First Circuit in a series of opinions concerning §1983 claims similar to those in the case at bar.[6]

State law also may actually provide a right of action, remedy and statute of limitations for violations of federal rights. This was evident in a recent Kansas case, Dutoit, supra, in which the plaintiffs challenged special assessments

[6]Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980), cert. denied, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980); Hussey v. Sullivan, 651 F.2d 74 (1st Cir. 1981); Holden v. Massachusetts Commission Against Discrimination, 671 F.2d 30 (1st Cir. 1982), cert. denied, 103 S.Ct. 97 (1982); Carter v. Supermarkets General Corp., 684 F.2d 187 (1st Cir. 1982); and Dewey v. University of New Hampshire, 694 F.2d 1 (1st Cir. 1982), cert. denied, 103 S.Ct. 2121 (1982). Accord, Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975), cert. denied, 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1975).

against their property as an unconstitutional "taking." Until recently, the Kansas Supreme Court had consistently held that strong state policy reasons required that such federal claims asserted under state law be brought within the thirty-day statutory limitation period. Cherry v. Vanlahai, 216 Kan. 195, 199, 531 P.2d 66 (1975).

Following the lead of the U.S. Circuit Court of Appeals for the Ninth Circuit in Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977), the Dutoit court selected a statute of limitations before it identified the most analogous cause of action that could be asserted under state law. This differed strongly from the methodology it used in Miller v. City of Overland Park, supra. These cases are representative of the many cases in which the lower courts have struggled with the

process of selecting a statute of limitations for §1983 claims due to a lack of direction from the U.S. Supreme Court.

One final category of "statutory" cases exists. In such cases certain state legislatures have provided a specific statute of limitations governing federal civil rights action. The one-year Tennessee statute of limitations applied by the Court in Johnson is representative of this type of statute. Id. at 456, n. 2, 95 S.Ct. at 1718.

B. **Measuring Consistency With Federal Policies.**

Selection of an analogous state cause of action and limitation period for a §1983 cause of action is only complete when the period under consideration, in the words of §1988, "is not inconsistent with the Constitution and laws of the United States." In a number of its recent

opinions involving §1983 statute of limitations questions, the Court has provided some guidance on when a limitation period may be "inconsistent" with federal policy.

In Robertson it was indicated that the §1983 policies of (1) preventing abuses of state power and (2) compensation of persons for violation of federal rights were the yardstick by which any state limitation period must be measured. Id. at 591, 56 L.Ed.2d at 561. The Court stated further that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." Id. at 593, 56 L.Ed.2d at 563.

In Tomanio the Court restated the above principles from Robertson and further developed the framework for analyzing "inconsistency" when it observed that

"[i]n order to guage consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared. On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations." Id. at 487, 64 L.Ed.2d at 449. The Court went on to affirm that statutes of limitations "have long been respected as fundamental to a well-ordered judicial system. . . in general, state policies of repose cannot be said to be disfavored in federal law." Id. at 447-448, 64 L.Ed.2d at 449-450. Following the reasoning of the above cases, in Chardon, supra, the Court implicity approved the application of Puerto Rico's one-year statute of limitations to the petitioners' §1983 claims.

In Johnson, the Court explained the concept of "inconsistency" by reference not to §1988 but to a line of prior cases in which the Court had used the predecessor of the current Rules of Decision Act, 28 U.S.C. §1652, as the basis for borrowing state law when a gap existed in federal law. Id. at 462, 95 S.Ct. at 172.[7] The oldest of the cases cited, Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895), involved a patent infringement action brought in federal court. The trial court concluded that the state statute of limitations was required to be applied to the claim by the terms of the Rules of Decision Act and found that the federal claim was barred as a result.

The Supreme Court upheld the trial court's decision in Campbell, but it also

[7] Supra, note 4. Cited with approval in Tomanio, 446 U.S. at 484, n. 3, 64 L.Ed.2d 447.

concluded that the requirement to absorb state periods of limitation could be displaced if the statute discriminated against the exercise of a federal right. Id. at 615, 39 L.Ed. at 282. The Court found the basis for this discretion in the final words of the Rules of Decision Act, which still requires application of state laws "in cases where they apply." 28 U.S.C. §1652. The type of discrimination specifically mentioned by the Court would arise in cases in which a state limitation period applied to causes of action enforceable only in federal court, i.e., one year for patent infringement, "while the ordinary limitation of six years was applied to all other actions in tort." Id. at 615, 39 L.Ed. at 282.

In Campbell the Court also referred to a second basis for not applying a state

limitation period. "So, too, it has been held that the statutes of limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void." [Citing Koshkonong v. Burton, 104 U.S. 668, 26 L.Ed. 886 (1881), and Wheeler v. Jackson, 137 U.S. 245, 34 L.Ed. 659 (1890]. This second prong of the Campbell Court's inconsistency analysis deserves attention due to its strong resemblance to the analysis employed by many courts, including the Fourth Circuit in the case at bar, in rejecting the specific state statutes of limitations that are suggested by the government defendants.

Both the cases cited in Campbell in support of the second prong of the Court's inconsistency analysis reflect the

Court's traditional approach to statutes of limitations that on their face appear "too short" to be consistent with federal policy. Koshkonong v. Burton involved an action to recover the amount due on municipal bonds, including interest. The plaintiff contended, and the lower court agreed, that the application of a six-year (and in some cases one-year) statute of limitations was an unconstitutional impairment of an obligation of contract.

In concluding differently than the lower court that the state statute of limitations was constitutional and could be given retroactive effect, the Court identified the constitutional limits on this state legislative power:

> It was, undoubtedly, within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that

> prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. (Citations omitted.) 104 U.S. at 675, 26 L.Ed. at 889. (Emphasis added.)

Nine years later in Wheeler v. Jackson the Court considered the constitutionality of a New York state statute of limitations which required a purchaser of tax delinquent properties in the City of Brooklyn to act within six months after the enactment of the statute to compel the execution or delivery of a lease. Citing Koshkonong v. Burton, supra, the Court restated the rule that "the Legislature may prescribe a limitation for the bringing of suits where none previously existed. . . provided, in each case, a

reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect." Id. at 255, 34 L.Ed. at 663. (Emphasis added.)[8] After examining the circumstances of the case, including the state policies underlying the six month limitation period, the Court concluded the law was constitutional.

Koshkonong v. Burton, Wheeler v. Jackson, and Campbell v. Haverhill pro-

[8]Quoting from another statute of limitations case, McGahey v. Virginia (Re Brown), 135 U.S. 662, 102 S.Ct. 972, 134 L.Ed. 304 (1889), the Court reaffirmed its commitment to nonuniformity in applying state limitation periods. "No one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another." Wheeler v. Jackson, 137 U.S. at 255, 134 L.Ed. at 663.

vide a sound basis for analyzing the consistency of a particular statute of limitations with "the Constitution and laws of the United States," as required by §1988. Under this methodology, a court should first inquire whether application of the limitation period under consideration would discriminate against a federal policy, i.e., is the period governing the federal cause of action shorter than that provided for asserting an analogous state cause of action? This question is particularly relevant in analyzing statutes enacted specifically for federal civil rights actions.[9]

Second, a court should determine whether, taking all the circumstances into consideration, the limitation period gives the plaintiff a reasonable time to

[9] Supra, note 2, 65 Cornell L.Rev. at 1049.

assert the federal cause of action under §1983. Based on Wheeler v. Jackson, two very relevant circumstances would include the plaintiff's prior knowledge of the governmental policy favoring repose and the state policies underlying the bar. Accord, Tomanio, 446 U.S. at 487, 64 L.Ed.2d at 449. Cf., Board of County Commissioners v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939).

C. **Suggested Methodology For Choosing The Applicable State Statute Of Limitations.**

Based on the foregoing, amicus respectfully recommends consideration of the following general methodology for analyzing §1983 statute of limitations questions:

1. If the state has enacted a statute of limitations for federal civil rights claims, that statute should be utilized so long as it is not inconsis-

tent with the Constitution and laws of the United States. Johnson, supra.

2. If the state has not enacted a statute specifically for civil rights claims, the statute governing the most analogous state common law or statutory cause of action should be applied as long as it is not inconsistent with the Constitution and laws of the United States. Tomanio, and Burns v. Sullivan, supra.

3. If the §1983 cause of action is equally analogous to several state causes of action, the longer statute of limitations should be applied as long as it is not inconsistent with the Constitution and laws of the United States.

4. If the §1983 cause of action has literally no state common law or

statutory law analogue, or if application of the analogous cause of action would be inconsistent with the Constitution and laws of the United States, a "catch-all" statute should be utilized as long as it is not inconsistent with the Constitution and laws of the United States.

5. In determining the "inconsistency" of a limitation period with the Constitution and laws of the United States, a court should make two inquiries:

(a) Does the limitation period under consideration "discriminate" against the §1983 cause of action? Campbell v. Haverhill, supra; and

(b) Does the limitation period under consideration, taking all the circumstances into consid-

eration, give the plaintiff a reasonable time in which to assert the federal cause of action under §1983? Koshkonong v. Burton, and Wheeler v. Jackson, supra. Circumstances relevant to this inquiry include: (i) federal policies behind §1983 and state policies of repose underlying the limitation period; (ii) the plaintiff's prior knowledge of the governmental action being challenged; (iii) the effect of related rules of repose, i.e., tolling, revival, relation-back, etc.; and (iv) actions by the plaintiff indicating the reasonableness of the limitation period.

III. THE STATUTORY LIMITATION PERIOD APPLIED BY THE TRIAL COURT IN THE CASE AT BAR IS MOST CLEARLY ANALOGOUS TO THE PLAINTIFFS' CAUSE OF ACTION AND IS CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE UNITED STATES.

Use of the approach suggested in Argument II to analyze the state statute of limitations applied by the trial court in the case at bar to the plaintiffs" federal civil rights claims clearly supports the conclusion that the Fourth Circuit erred in reversing the trial court's decision. Rather than identifying the "most analogous state cause of action" and the consistency of its applicable statute of limitations with the Constitution and laws of the United States, the court concluded, as it had in McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983), that the Maryland legislature could not have

intended that the limitation period in Md. Ann. Code, Article 49B, §9(a), be applied to civil actions for discrimination. Grattan v. Burnett, 710 F.2d 160, 162. (4th Cir. 1983).

Amicus respectfully submits that with the exception of state statutes of limitations specifically enacted for federal civil rights actions, considerations of state legislative intent are irrelevant to any analysis of the consistency of a particular limitation period with federal law. The court below should have examined (1) whether the state cause of action and its limitation period are most analogous to the §1983 cause of action, Tomanio, 446 U.S. at 487, 64 L.Ed.2d at 449, and (2) whether the limitation period is "inconsistent" with the Constitution and other federal laws. In their Petition for Writ of Certiorari, counsel

for the State of Maryland ably demonstrated how the only other analogous state cause of action available to plaintiffs, a civil action by a public employee seeking a writ of mandamus for employment discrimination based on race, would be barred by laches after five and one-half months. Petition for Writ of Certiorari and Appendix, p. 12. The limitation period selected by the trial court as most analogous is six-months in length.

Amicus respectfully urges the Court to reject the Fourth Circuit's misplaced reliance on state legislative intent in examining the causes of action and limitation periods suggested by the State of Maryland. Rather, the Court should examine whether application of either limitation period would be inconsistent with the Constitution or laws of the United States. 42 U.S.C. §1988. Although not

mentioned directly, there can be little doubt from the Fourth Circuit's opinion that this was the critical factor that motivated its rejection of the shorter state limitation periods.

In regard to the discrimination prong of the inconsistency inquiry suggested by Campbell v. Haverhill, supra, there is no indication that application of either of the state limitation periods of 165 days (Md. Ann. Code, Article 64A, §33) or six months (Md. Ann. Code, Article 49B, §9(a)) would discriminate against the assertion of the plaintiffs' federal civil rights causes of action. As discussed in petitioners' Petition for Writ of Certiorari, a claim by a Maryland public employee of employment discrimination could be asserted under various

state causes of action.[10] Maryland law requires the prompt assertion of these causes of action, i.e., within six months or less. Consequently, no discrimination against the assertion of the federal civil rights claims can be said to exist if the six-month limitation period is "borrowed."

The second prong of any analysis for "inconsistency" between a state limitation period and federal law requires asking whether, under all the circumstances, including the state policies underlying the limitation period and the policies underlying §1983, the state law afforded the plaintiffs a reasonable time within

[10]These actions include mandamus, an action under Maryland's classified state employee grievance procedure law (Article 64A), an action under Code of Maryland Regulations §06.06.0160 for unclassified employees, or an action under Maryland's Human Relations Law (Article 49B).

which to bring the action. Perhaps the strongest argument that, under the circumstances, the proposed state limitation periods afforded plaintiffs a reasonable time within which to bring their federal civil rights actions is that they did file charges of discrimination with the U.S. Equal Employment Opportunity Commission within the six-month limiation period required by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e(5)(e).

Title VII in no way prevented plaintiffs from initially or later commencing actions pursuant to 42 U.S.C. §§1981 and 1983. Johnson, 421 U.S. at 459, 95 S.Ct. at 1719; Johnson v. Cincinnati, 450 F.2d 796 (6th Cir. 1971); and Curran v. Portland Super. Sch. Committee, Etc., 435 F.Supp. 1063, 1081 (D.Me. 1977). They simply chose not to do so. Plaintiffs' ability to file their claims in a timely

manner under Title VII, however, indicates that the court below erred in concluding the period was inadequate.

Secondly, as argued by the State of Maryland and acknowledged by the Court in Tomanio, Robertson, and Johnson, supra, and cases cited therein, the state policies favoring early repose in employment discrimination actions deserve considerable weight. Public employees in Maryland who experience discrimination in the workplace have an array of federal and state remedies available to them. The Maryland state legislature has simply concluded that it is in the interest of the people of Maryland that claims of employment discrimination under state law be promptly asserted and resolved.

As noted by the State of Maryland, it is not alone in this regard. The legislatures of at least 30 states, including

Kansas, have adopted similar limitation periods which have not proved to be obstacles to employment discrimination actions. This history of widespread state legislative action in the area of employment discrimination and the similarity of such limitation periods indicate that any concern about the possible inconsistency between these laws and the policies of deterrence and compensation underlying §1983 is simply unfounded.

Due to the absence of any discriminatory impact or inconsistency with the Constitution and laws of the United States, amicus respectfully urges the Court to give deference to the judgment of the Maryland state legislature that causes of action for public employment discrimination be asserted and resolved promptly. Indeed, little additional justification for this valid state policy is

needed when the Court considers that plaintiffs' Title VII claims and state claims were filed some seven years ago.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

Respectfully submitted,

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